

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 21 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CHARLES E. JACKSON,

Plaintiff - Appellant,

v.

TOM L. CAREY; et al.,

Defendants - Appellees.

No. 06-17122

D.C. No. CV-98-05723-AWI

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted January 16, 2009
San Francisco, California

Before: WALLACE, FARRIS and McKEOWN, Circuit Judges.

Jackson alleges that the District Court's decision to grant summary judgment to defendants on plaintiff's due process claim was improper since there a liberty interest was at stake. We agree. The Supreme Court in *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005), did not state that only indefinite transfers to security housing

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

units implicate liberty interests, but that a transfer of thirty days or less did not implicate liberty interests. Plaintiff was kept in the security housing unit for five months, a significant amount of time. It is unclear whether a liberty interest is implicated by plaintiff's five month confinement in the security housing unit. The District Court erred by granting summary judgment on plaintiff's due process claim.

Plaintiff also alleges that the District Court acted improperly in dismissing his case for failure to exhaust administrative remedies. It is necessary that administrative remedies be properly exhausted before prisoners begin the appeals process. 42 U.S.C. § 1997(e); *see Woodford v. Ngo*, 548 U.S. 81 (2006). However, plaintiff exhausted his administrative remedies by winning his first appeal. After that victory, the administrative process could no longer provide relief since relief had been granted. *See Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005).

Although defendants claim that plaintiff's failure to file proper paperwork with his second appeal is facial evidence that plaintiff did not exhaust his administrative remedies, this argument is unpersuasive. Once plaintiff won his first appeal, the prison had a duty to prevent plaintiff's transfer to the security housing unit. That duty includes notifying the personnel responsible for transferring prisoners that plaintiff should not have been transferred, as stated in California's Department of

Corrections Operations Manual. § 54100.18.3.2. The District Court erred by dismissing plaintiff's claim.

Finally, plaintiff alleges that the District Court was wrong to dismiss his claim that “his First Amendment right to petition the government for redress of grievances” was violated. Per the Prison Litigation Reform Act, a prisoner may not petition the courts before his administrative remedies are exhausted. As a result, “a prisoner’s fundamental right of access to the courts hinges on his ability to access the prison grievance system.” *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). Since plaintiff properly exhausted his administrative remedies through successful appeal but was denied the remedy he had been granted, he has the right to petition the courts for a violation of his First Amendment rights. The District Court erred by dismissing plaintiff's First Amendment claim under Federal Rule of Civil Procedure 12(b)(6).

REVERSED AND REMANDED.